

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

VIRGINIA GUTIERREZ, ) NO. ED CV 15-889-E  
Plaintiff, )  
v. )  
CAROLYN W. COLVIN, ACTING ) MEMORANDUM OPINION  
COMMISSIONER OF SOCIAL SECURITY, ) AND ORDER OF REMAND  
Defendant. )  
\_\_\_\_\_  
)

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS  
HEREBY ORDERED that Plaintiff's and Defendant's motions for summary  
judgment are denied and this matter is remanded for further  
administrative action consistent with this Opinion.

PROCEEDINGS

Plaintiff filed a complaint on May 6, 2015, seeking review of the  
Commissioner's denial of disability benefits. The parties filed a  
consent to proceed before a United States Magistrate Judge on  
July 13, 2015. Plaintiff filed a motion for summary judgment on

1 November 6, 2015. Defendant filed a cross-motion for summary judgment  
 2 on December 7, 2015. The Court has taken the motions under submission  
 3 without oral argument. See L.R. 7-15; "Order," filed May 11, 2015.

4

5 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

6

7 Plaintiff asserts disability since November 9, 2009, based on a  
 8 combination of alleged impairments (Administrative Record ("A.R.") 65-  
 9 84, 200-01, 206-07, 249). An Administrative Law Judge ("ALJ") found  
 10 Plaintiff suffers from several severe "medically determinable  
 11 impairments," including "severe left ear hearing loss with fluctuating  
 12 hearing in the right ear" (A.R. 27). In defining Plaintiff's supposed  
 13 residual functional capacity, however, the ALJ failed to include any  
 14 hearing limitation (A.R. 29). Similarly, in framing hypothetical  
 15 questions for the vocational expert, the ALJ failed to mention  
 16 Plaintiff's severe hearing impairment (A.R. 91). In at least partial  
 17 reliance on the vocational expert's testimony, the ALJ found that a  
 18 person having Plaintiff's supposed residual functional capacity could  
 19 perform all of Plaintiff's past relevant work (A.R. 32). The Appeals  
 20 Council denied review (A.R. 1-5).

21

22 **STANDARD OF REVIEW**

23

24 Under 42 U.S.C. section 405(g), this Court reviews the  
 25 Administration's decision to determine if: (1) the Administration's  
 26 findings are supported by substantial evidence; and (2) the  
 27 Administration used correct legal standards. See Carmickle v.  
Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,

499 F.3d 1071, 1074 (9th Cir. 2007); see also *Brewes v. Commissioner*,  
682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such  
relevant evidence as a reasonable mind might accept as adequate to  
support a conclusion." Richardson v. Perales, 402 U.S. 389, 401  
(1971) (citation and quotations omitted); see also *Widmark v.*  
*Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006).

If the evidence can support either outcome, the court may not substitute its judgment for that of the ALJ. But the Commissioner's decision cannot be affirmed simply by isolating a specific quantum of supporting evidence. Rather, a court must consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [administrative] conclusion.

Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations and quotations omitted).

## DISCUSSION

As the ALJ expressly acknowledged, “[a]n impairment or combination of impairments is ‘severe’ within the meaning of the regulations if it significantly limits an individual’s ability to perform basic work activities” (A.R. 26). See 20 C.F.R. § 404.1520(c); 20 C.F.R. § 416.920(c). Here, the ALJ erred by defining a residual functional capacity that failed to comprehend the necessarily significant work-related limitations caused by Plaintiff’s severe hearing impairments. See, e.g. Spurling v. Commissioner, 2009

1 WL 1393369, at \*12 (N.D. W. Va. May 14, 2009) (ALJ erred where "[t]he  
 2 ALJ did not include any limitation in his RFC for Plaintiff's hearing  
 3 loss even though he found it to be a severe impairment").<sup>1</sup> The ALJ  
 4 similarly erred by failing to mention any hearing limitation in the  
 5 hypothetical questions posed to the vocational expert. See DeLorme v.  
 6 Sullivan, 924 F.2d 841, 850 (9th Cir. 1991) (hypothetical question to  
 7 the vocational expert must "set out all of the claimant's  
 8 impairments"); accord Gamer v. Secretary, 815 F.2d 1275, 1280 (9th  
 9 Cir. 1987); Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984).

10  
 11 Defendant appears to argue that any error was harmless, positing  
 12 that Plaintiff's hearing limitations assertedly would not impact her  
 13 past relevant work as a "customer service representative." This  
 14 argument must be rejected. On the present record, substantial  
 15 evidence does not support the conclusion Plaintiff could perform her  
 16 work as a "customer service representative" notwithstanding her severe  
 17 hearing impairments.

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18  
 19 <sup>1</sup> At one point in the ALJ's decision, the ALJ appears to  
 20 backtrack on the earlier finding of severe medically determinable  
 21 hearing impairments (A.R. 30) ("the claimant has not provided  
 22 evidence in the form of audiogram testing to establish the  
 23 existence of a severe medically determinable hearing  
 24 impairment"). To the extent that the ALJ's decision is  
 25 inconsistent or ambiguous on the issue of whether Plaintiff has  
 26 any significant hearing-related limitation, remand would be  
 27 required to clarify the decision. See Regennitter v.  
Commissioner, 166 F.3d 1294, 1297 (9th Cir. 1999) (an ALJ's  
 28 inaccurate characterization of the record, when material,  
 warrants remand); Rodriguez v. Astrue, 2011 WL 1103119, at \*9  
 (E.D. Cal. March 22, 2011) ("remand for further proceedings is  
 proper due to the ambiguity of the ALJ's decision . . ."); Mingo  
v. Apfel, 1998 WL 373411, at \*2 (D. Kan. July 1, 1998) (remand  
 necessary where the Administration conceded the ALJ's findings  
 were internally inconsistent).

1       Although the claimant has the burden of proving an inability to  
 2 perform his or her past relevant work, "the ALJ still has a duty to  
 3 make the requisite factual findings to support his [or her]  
 4 conclusion." Pinto v. Massanari, 249 F.3d 840, 844 (9th Cir. 2001).  
 5 The incompleteness of the hypothetical questions posed to the  
 6 vocational expert in the present case prevents that expert's testimony  
 7 from furnishing substantial evidence that Plaintiff can perform her  
 8 past relevant work. See DeLorme v. Sullivan, 924 F.2d at 850; Gamer  
 9 v. Secretary, 815 F.2d at 1280; Gallant v. Heckler, 753 F.2d at 1456.  
 10 An ALJ need not always consult a vocational expert to help determine  
 11 whether a claimant can perform the claimant's past relevant work. See  
 12 Matthews v. Shalala, 10 F.3d 678, 681 (9th Cir. 1993); Miller v.  
 13 Heckler, 770 F.2d 845, 850 (9th Cir. 1985). However, "[t]o determine  
 14 whether a claimant has the residual capacity to perform his [or her]  
 15 past relevant work, the [Administration] must ascertain the demands of  
 16 the claimant's former work and then compare the demands with his [or  
 17 her] present capacity." Villa v. Heckler, 797 F.2d 794, 797-98 (9th  
 18 Cir. 1986); see 20 C.F.R. § 404.1520(e).

19  
 20       In finding that an individual has the capacity to perform a past  
 21 relevant job, the determination or decision must contain among the  
 22 findings the following specific findings of fact:

23  
 24           1. A finding of fact as to the individual's RFC  
 25 [residual functional capacity].

26  
 27           2. A finding of fact as to the physical and mental  
 28 demands of the past job/occupation.

1           3. A finding of fact that the individual's RFC would  
2        permit a return to his or her past job or occupation. SSR  
3        82-62 (emphasis added).

4

5 See Dealmeida v. Bowen, 699 F. Supp. 806, 807 (N.D. Cal. 1988).

6

7       In making these findings, the ALJ must conduct a searching  
8       inquiry and analysis.

9

10      The decision as to whether the claimant retains the  
11     functional capacity to perform past work which has current  
12     relevance has far-reaching implications and must be  
13     developed and explained fully in the disability decision.  
14      Since this is an important and, in some instances, a  
15     controlling issue, every effort must be made to secure  
16     evidence that resolves the issue as clearly and explicitly  
17     as circumstances permit.

18

19      Reasonable inferences may be drawn, but presumptions,  
20     speculations and suppositions must not be used. SSR 82-62.

21

22      Evidence concerning the hearing-related demands of Plaintiff's  
23     past relevant work (including Plaintiff's past relevant work as a  
24     "customer service representative") is sparse or non-existent on the  
25     present record. The ALJ's failure to inquire further regarding these  
26     demands constituted error. See SSR 82-62; see also Burkhart v. Bowen,  
27     856 F.2d 1335, 1341 (9th Cir. 1988) (Administration may not speculate  
28     concerning the requirements of particular jobs); Brown v. Heckler, 713

1 F.2d 441, 443 (9th Cir. 1983) ("the ALJ has a special duty to fully  
 2 and fairly develop the record and to assure the claimant's interests  
 3 are considered . . .").

4

5 The Court is unable to conclude that the above-discussed errors  
 6 were harmless. See Treichler v. Commissioner, 775 F.3d 1090, 1105  
 7 (9th Cir. 2014) ("Where, as in this case, an ALJ makes a legal error,  
 8 but the record is uncertain or ambiguous, the proper approach is to  
 9 remand the case to the agency"); Garcia v. Commissioner, 768 F.3d 925,  
 10 932-34 (9th Cir. 2014) (a failure to develop the record is not  
 11 harmless unless it is "clear from the record" that the error was  
 12 "inconsequential to the ultimate nondisability determination"; citing  
 13 Tommasetti v. Astrue, 533 F.3d 1035 (9th Cir. 2008)); see also McLeod  
 14 v. Astrue, 640 F.3d 881, 887 (9th Cir. 2011) (error not harmless where  
 15 "the reviewing court can determine from the 'circumstances of the  
 16 case' that further administrative review is needed to determine  
 17 whether there was prejudice from the error").

18

19 Remand is appropriate because the circumstances of this case  
 20 suggest that further administrative review could remedy the ALJ's  
 21 errors. McLeod v. Astrue, 640 F.3d at 888; see also INS v. Ventura,  
 22 537 U.S. 12, 16 (2002) (upon reversal of an administrative  
 23 determination, the proper course is remand for additional agency  
 24 investigation or explanation, except in rare circumstances); Dominguez  
 25 v. Colvin, 2015 WL 8600040, at \*3 (9th Cir. Dec. 14, 2015) ("Unless  
 26 the district court concludes that further administrative proceedings  
 27 would serve no useful purpose, it may not remand with a direction to  
 28 provide benefits"); Treichler v. Commissioner, 775 F.3d at 1101 n.5

1 (remand for further administrative proceedings is the proper remedy  
2 "in all but the rarest cases").  
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**CONCLUSION**

6 For all of the foregoing reasons,<sup>2</sup> Plaintiff's and Defendant's  
7 motions for summary judgment are denied and this matter is remanded  
8 for further administrative action consistent with this Opinion.  
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10 LET JUDGMENT BE ENTERED ACCORDINGLY.  
11  
12 DATED: January 4, 2016.  
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/S/  
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CHARLES F. EICK  
16 UNITED STATES MAGISTRATE JUDGE  
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<sup>2</sup> The Court has not reached any other issue raised by Plaintiff except insofar as to determine that reversal with a directive for the immediate payment of benefits would not be appropriate at this time. "[E]valuation of the record as a whole creates serious doubt that [Plaintiff] is in fact disabled." See Garrison v. Colvin, 759 F.3d 995, 1021 (9th Cir. 2014).